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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. [redacted] 49

EDWARD MISHKIN,

Appellant,

against

THE STATE OF NEW YORK,

Appellee.

ON APPEAL TO THE COURT OF APPEALS
OF THE STATE OF NEW YORK

STATEMENT AS TO JURISDICTION

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Opinions Below

The Court of Appeals did not write an opinion. The Appellate Division did not write an opinion. The trial court did write an opinion which is reported in 26 Misc. 2d 152, and is also found at page 720 of the Record of Appeal.

Jurisdiction

(i) This case arises from the conviction of the appellant for having published, possessed for sale, and employ-

ing others for that purpose in violation of Section 1141 of the Penal Law of New York. The defendant faces a sentence of three consecutive years imprisonment and fines aggregating $12,000.

(ii) The judgment of affirmance by the New York Court of Appeals was made and entered on December 3, 1964.

A motion to amend the remittitur of the Court of Appeals was granted, and an order to that effect was entered on January 7, 1965. The order directed that the remittitur be amended to read as follows:

> "Defendant argued that Section 1141 of the Penal Law of the State of New York is invalid under the Constitution of the United States for proscribing sadistic and masochistic publications in general and as applied to the publications in this case in particular and, also, for vagueness; and, further, that his rights under the Fourth and Fourteenth Amendments to the Constitution were violated, respectively, by unlawful searches and seizures and by his conviction without proof that he was aware of the obscene nature of the publications. This Court held that Section 1141 of the Penal Law was valid and that there was no violation of the rights of defendant either under the Constitution of the United States or the Amendments thereto." (Appendix B)

The Notice of Appeal was filed on December 16, 1964 in the Criminal Court of the City of New York.

(iii) The jurisdiction of this court is conferred by 28 U.S.C. Section 1257 (2).

(iv) The following decision sustains the jurisdiction of this court to review judgments by appeal in this case: *Winters* v. *New York,* 333 U. S. 507.

Questions Presented

(1) Does Section 1141 of the Penal Law on its face offend the Constitution of the United States in that it proscribes publications that are sadistic and masochistic?

(2) Does Section 1141 of the Penal Law on its face offend the Constitution of the United States for vagueness in its definition of sadism and masochism?

(3) Does Section 1141 of the Penal Law on its face offend the Constitution of the United States for vagueness in its definition of obscenity?

(4) Was Section 1141 of the Penal Law unconstitutionally to the publications in this case?

(5) Are the publications obscene within the construction of the Fourteenth Amendment to the Constitution of the United States?

(6) Was the Fourteenth Amendment violated by the conviction of the appellant without proof that he knew the obscene nature of the contents of the publications?

(7) Were the searches of and seizures at the appellant's premises in violation of the Fourth Amendment to the Constitution of the United States?

Statute Involved

Section 1141 of the Penal Law, in pertinent part, reads as follows:

> "1. A person who * * * has in his possession with intent to sell, lend, distribute * * * any obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic or

prints, utters, publishes, or in any manner manufacturers, or prepares any such book * * * or who,

"2. In any manner, hires, employs, uses or permits any person to do or assist in doing any act or thing mentioned in this section, or any of them.

"Is guilty of a misdemeanor * * *."

Statement

Permission was granted to appeal to the Court of Appeals by a judge of that court, who certified that there were questions involved which ought to be reviewed by that court. Thereafter, that court affirmed the conviction. The conviction carries a sentence of three (3) consecutive years of imprisonment and fines totalling $12,000.

The pertinent charges against appellant are 159 counts classified as follows:

Counts 1 through 62 deal with unlawful possessing with intent to sell certain "obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting" books,—all characterizations stated conjunctively.

Counts 63 through 110 deal with unlawful publishing the aforesaid books,—characterized conjunctively.

Counts 111 through 159 charged him with unlawfully hiring others to prepare said books,—also characterized conjunctively.

The record does not show that appellant knew the nature of the contents of the books. And if he is to be assumed to have known, constructively, there is also lacking any proof in the record that appellant knew the character of the books whether they were obscene, sadistic, masochistic and disgusting as charged by the Information or proscribed by the statute.

He was found guilty of 140 of the counts (Rp. 699).

Stage and Manner of Raising Federal Questions

The questions here presented were raised and passed upon by the Court of Appeals, as its certificate indicates (App. B). *Home Insurance Co.* v. *Dick,* 281 U. S. 397. The same questions were raised in appellant's brief in the Appellate Division.

The questions were raised at the trial by motion, and overruled (Rp. 126, 127, 135, 136, 682, 683, 699).

The Questions Are Substantial

1. The first question raises the problem concerning books that are sought to be condemned as sadistic or masochistic. This court has never passed on the question whether the use of such language is vague; and if the language is clear whether such publications may be proscribed without offending the First Amendment. The statute speaks about obscene, sadistic or masochistic books. The Information accuses the defendant of the possession and publication of them in conjunction with obscenity. Indeed, the appellee took the position that the books involved in this prosecution fell into the category of sadistic and masochistic (Rp. 132).

This court has held that only obscene books are not protected by the Constitution (*Roth* v. *United States,* 354 U. S. 476). Descriptions of human baseness, or irregularity or perversion cannot be legislatively condemned. *Kingsley Pictures Corp.* v. *Regents,* 360 U. S. 684; *Yates* v. *United States,* 354 U. S. 298; *Grove Press* v. *Gerstein,* 34 Sup. Ct. Reporter 1909; *Manual Enterprises* v. *Day,* 370 U. S. 478; *Trolins* v. *Gerstein,* 84 Sup. Ct. Reporter 1903; *Times Film Corp.* v. *Chicago,* 355 U. S. 35; *Jacobellis* v. *Ohio,* 378 U. S. 184; *One, Inc.* v. *Oelsen,* 355 U. S. 371.

2. The words sadism and masochism have a broad meaning. In general they refer to acts of cruelty which afford

pleasure to the actor; and conversely masochism is the enjoyment of the cruelty by the receiver. In that sense, publications with such qualities suffer from the same vagueness as this court found in publications "principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime". *Winters* v. *New York,* 333 U. S. 507.

The bloodletting in Shakespeare, the Bible, Greek drama and even in our contemporary "westerns" would suffer like condemnation as appealing to the gory and the cruel.

Since this charge against appellant was stated with obscenity and the appellee tried the case on the theory that the books were sadistic and masochistic, there is no way of separating a theory that books are obscene rather than sadistic. Accordingly, under the doctrine of *Stromberg* v. *California,* 283 U. S. 359, 368 and *Winters* v. *New York,* a reversal must follow if the statute is infirm in prohibiting publications.

3. Another question raised by this appeal is failure of the prosecution to prove either (1) that appellant knew the contents of the books, or knew them to be of the character condemned by the statute. The case was tried on the theory by the court that it was not necessary under New York law that there be proof of knowledge by the accused of either the contents or the character of the contents (Rp. 689-690).

Actual knowledge of the contents of a book by the accused must be established. There is no proof that appellant knew the contents of the books. It is therefore submitted that the proof fell short of the requirement of *Smith* v. *California,* 361 U. S. 147.

4. Ancillary to this question is the additional requirement of the *Smith* case that it be shown that the accused knew that the books were obscene, sadistic, masochistic and disgusting. In order to punish for publishing, it is necessary that it be proved that the defendant have an

evil attitude, that a *mens rea* be shown. This court said in *Smith*, p. 154: "by penalizing booksellers even though they had not the slightest notice of the *character* of the books they sold"; and again, at p. 154, "falsely deny reason to suspect their *obscenity*".

Justice Black, in concurrence, said (p. 156): "The court invalidates the ordinance solely because it penalizes a bookseller for mere possession of an 'obscene' book even though he is unaware of its *obscenity*". Likewise, Justice Frankfurter noted (p. 161), "But it holds that one cannot be made amenable to such criminal outlawry unless he is chargeable with *knowledge of the obscenity*".

Thus, this court made knowledge of the *character* of a publication as a factor in proof of the crime. So that it is not knowledge of the contents alone that must be proved, but also the character of the contents. In this case there is neither proof.

5. Another question raised by this appeal is the challenge to the obscenity law, Section 1141, as applied to these publications. In *Roth* v. *United States*, 354 U. S. 476, the test was laid down, whether to the average person, applying contemporary community standards, the dominant theme of the material, taken as a whole appeals to prurient interests. Since it is prurient interests to whom the books must appeal, the question is, do these books appeal to such interests? At worst, these books can be described as trashy or vulgar. Instead of being aphrodisiac they probably are a bore. The trial court found them "sickening" (Rp. 716). Such characterization is inconsistent with appeal to pruriency. They would have the opposite effect. Instead of stimulating the erotic, they disgust and sicken. Such effect is not what *Roth* condemned.

6. Ancillary to this question, the appellant raises the point of the adequacy of the definition of obscenity in *Roth*. For if it was difficult to determine the meaning of the

statute before *Roth,* the handicap of vagueness still persists. Emerson-Toward a General Theory of the First Amendment, 72 Yale L. J. 877, at 938. The guessing at what the statute forbids and what it permits has resulted in a three-year prison sentence imposed on this appellant. It does not comport with justice that a man be denied his freedom for three years because he guessed wrongly at the meaning of a statute.

The books in question are in principle with those in *Grove Press Inc.* v. *Gerstein, supra,* and in *Tralins* v. *Gerstein, supra.* They may not have been written as skillfully as the ones in the cases cited. But their character is the same. In all of them, the dominant theme is erotic. Literary skill or excellence is not the criterion for absolving a book, for if it were so, then courts would have to become literary critics and arbiters of desirable standards of literature. Compare what was said in *Winters* v. *New York,* 333 U. S. 507, 510: "What is one man's amusement teaches another's doctrine. Though we see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature".

7. Another question raised herein concerns itself with the wholesale seizures of books and their use against appellant. The case was commenced and tried before the decision of this court in *Mapp* v. *Ohio,* 367 U. S. 643. Until then, New York was governed by the decision in *People* v. *Defore,* 242 N. Y. 13, which allowed in evidence materials seized even in violation of the Fourth Amendment. Accordingly, the trial court neither explored the question when raised nor was the New York procedure fashioned in any manner to receive such challenges.

The evidence is that six police officers went to a building at 37 West 20th Street, New York City and in a basement room about 25 by 30 feet and 12 feet high, where a "quantity" of books were seen, and they "seized them

all'' (Rp. 134). The prosecution promised to produce the police officer, who it was alleged, obtained a search warrant (Rp. 136). This was never done.

The tally of the amount of books seized shows that 17,121 volumes were seized (Rp. 139-143). It took two days to remove all the books in the room (Rp. 137). Exhibits 1 through 42 referred to in the Information were among those seized in that room (Rp. 137). This case involves a more flagrant seizure than in *A Quantity of Books* v. *Kansas,* 12 L. ed. 2d 809, for in the *Kansas* case at least an attempt was made toward specificity in the search warrant and the district judge there held a 45-minute hearing in which he examined the books. In this case nothing was done to substantiate the alleged search warrant, although the prosecution had promised to do so (Rp. 136). And the testimony as to the exhibits was received subject to the production of that witness.

The subject was not further pressed or pursued, no doubt, because of existing New York law. But since the issue was raised, the constitutional question remained open, *People* v. *Loria,* 10 N. Y. 2d, 368; *People* v. *Coffey,* 11 N. Y. 2d, 142. The issue therefore is still before this court to determine whether the seizures of literature was consistent with constitutional protections. *Marcus* v. *Search Warrants of Property, etc.,* 367 U. S. 717; *Jones* v. *United States,* 357 U. S. 493; *Kremen* v. *United States,* 353 U. S. 346.

As to the remaining volumes used in evidence, no warrant for their seizure in large quantities was obtained (Rp. 145-156), and the principles of the *Marcus, Mapp* and *Kansas* cases were violated.

Conclusion

It has been shown that several novel questions of substantiality are presented which should be reviewed by this

court. Surely, a man facing a three-year prison sentence for the distribution of books should have every opportunity afforded him for the protection of his constitutional rights.

Respectfully submitted,

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APPENDIX A

Judgment of Court of Appeals

COURT OF APPEALS

State of New York, ss.:

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 3rd day of December, in the year of our Lord one thousand nine hundred and sixty-four, before the Judges of said Court.

Witness,

The Hon. Charles S. Desmond, Chief Judge, Presiding.

Raymond J. Cannon, Clerk.

Remittitur December 3, 1964.

THE PEOPLE, etc.,
Respondent-Appellant,

against

EDWARD MISKIN,
Appellant-Respondent.

BE IT REMEMBERED, That on the 28th day of April, in the year of our Lord one thousand nine hundred and sixty-four, EDWARD MISHKIN, the appellant-respondent, in this cause, came here unto the Court of Appeals, by EMANUEL REDFIELD, his attorney and filed in the said Court a Notice of Appeal and return thereto from the judgment of the Appellate Division of the Supreme Court in and for the First Judicial Department. THE PEOPLE, etc., the respondent-appellant, in said cause, afterwards appeared in said Court of Appeals by FRANK S. HOGAN, District Attorney, and filed a Notice of Appeal from the order of said Appellate Division.

Which said Notices of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals, this cause having been submitted, after due deliberation had thereon, did order and adjudge that the judgment and order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby are affirmed.

And it was also further ordered, that the record aforesaid, and the proceeding in this Court, be remitted to the Criminal Court of the City of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said judgment and order be affirmed, as aforesaid.

AND hereupon, as well the Notices of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Criminal Court of the City of New York before the Judge thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Criminal Court before the Judges thereof.

RAYMOND J. CANNON,
Clerk of the Court of Appeals
of the State of New York.

Court of Appeals, Clerk's Office,
Albany, December 3, 1964.

I hereby Certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

SEAL

RAYMOND J. CANNON,
Clerk.

APPENDIX B

Order Amending Remittitur

STATE OF NEW YORK

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Seventh day of January, A. D. 1965.

Present, HON. CHARLES S. DESMOND, Chief Judge, presiding.

Mo. No. 37

THE PEOPLE &c.,

Respondent,

vs.

EDWARD MISHKIN,

Appellant.

A motion to amend the remittitur in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted, the return of the remittitur requested and, when returned, it will be amended by adding thereto the following:

Defendant argued that section 1141 of the Penal Law of the State of New York is invalid under the Constitution of the United States for proscribing sadistic and

masochistic publications in general and as applied to the publications in this case in particular and, also, for vagueness; and, further, that his rights under the Fourth and Fourteenth Amendments to the Constitution were violated, respectively, by unlawful searches and seizures and by his conviction without proof that he was aware of the obscene nature of the publications. This Court held that section 1141 of the Penal Law was valid and that there was no violation of the rights of defendant either under the Constitution of the United States or the Amendments thereto.

And the Criminal Court of the City of New York hereby is requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

.....

Deputy Clerk